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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JAMES E. FISHER,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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October 30, 1981

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QUESTIONS PRESENTED

I. Who has the burden of proof and what is the standard of review in the appellate court when the Government appeals the trial court's dismissal of an indictment?

II. Can the RICO statute properly be applied to a Defendant with no connection to the persons or activities of organized crime?

III. Does the indictment allege facts sufficient to constitute a violation of the Texas commercial bribery statute?

IV. Are the certification regulations of the Emergency Petroleum Allocation Act unconstitutionally vague for purposes of a criminal prosecution?

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OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 646 F.2d 946 (5th Cir. 1981). The District Court, Honorable Ross N. Sterling, in dismissing the indictment issued no formal written opinion.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) (1966).

STATEMENT OF THE CASE

On March 7, 1979 a Houston grand jury returned an eighty four count indictment against two oil companies and five individuals, including Petitioner Fisher. The underlying theme of the entire indictment is a supposed

fraudulent scheme to miscertify and sell crude oil. The specific charges include conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), a pattern of racketeering activities under RICO, mail fraud, wire fraud and false statements pursuant to 18 U.S.C. §1001. Each of these counts is founded upon alleged noncompliance with certification regulations promulgated by the Federal Energy Administration (now, Department of Energy).

Petitioner Fisher was, at the times in question, an employee of Uni Oil, Inc., a small company in the business of reselling crude oil. The oil industry labors under extensive federal regulation, including regulations issued in association with the Emergency Petroleum Allocation Act (EPAA). That statute was passed in 1973 principally to control the price of domestically produced oil, so as to combat the effect of the Arab oil embargo. The essence of this price control program was classification of crude oil as "old" or "new" oil, depending upon the date of its production. New oil could be sold at prices substantially higher than those for old oil.

The purpose of the certification regulations was to denominate oil as new or old, so that purchasers could distinguish one from the other in the marketplace. Regulations which initially applied only to producers were in time extended to resellers as well. As a consequence, resellers of crude oil become obligated to certify to buyers the amounts of old and new oil which were being sold. Alleged miscertification under these regulations lies at the heart of each count in the present indictment and forms the basis of each Title 18 offense charged.

Each of the defendants filed motions to dismiss the indictment. Following an extensive hearing on May 29,

1979, the Honorable Ross N. Sterling of the United States District Court for the Southern District of Texas granted these motions and the indictment was dismissed. A brief order without discussion or authorities was subsequently signed by the Court. On July 24, 1979 Judge Sterling also dismissed a later, similar indictment against Mid-Atlantic Petroleum Company, Ltd. and eight other corporate and individual defendants. The appeals of these two cases by the Government were consolidated before the Fifth Circuit Court of Appeals.

On May 19, 1981 a three-judge panel of the Fifth Circuit Court of Appeals issued an opinion which reversed the District Court's dismissal of the indictment. The Defendants/Appellees filed Motions For Rehearing and Rehearing En Banc, which were denied by the Fifth Circuit Court of Appeals on September 4, 1981. It is from the Fifth Circuit's reversal of the District Court that this appeal is perfected by way of this Petition for Writ of Certiorari.

I.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THE CIRCUIT COURT IMPROPERLY SHIFTED THE BURDEN ON APPEAL AND APPLIED THE WRONG TEST OF REVIEW.

A. The Burden Rested Upon the Government.

The appeal of this cause before the Fifth Circuit Court of Appeals as to James E. Fisher was one by the Government contesting the Trial Court's granting of Fisher's motion to dismiss a voluminous eighty-four count indictment against him. On appeal, the burden of demonstrating

prejudicial error rested squarely upon the party attacking the Trial Court's ruling. *Hanna v. United States,* 404 F.2d 405, 406 (5th Cir. 1968); *Dedemore v. United States,* 322 F.2d 938, 946 (9th Cir. 1963). Even a cursory review of the Fifth Circuit Court's sixteen page opinion, however, will reveal that the burden on appeal before that court was imposed upon Mr. Fisher and his fellow Appellees. *See United States v. Uni Oil,* 646 F.2d 946 (5th Cir. 1981). Nowhere does the opinion of the lower court acknowledge the Government's obligation to prove error. Rather, the opinion poses each of the grounds for dismissal raised in the lower court by the various Defendants—Appellees and then sets out to hold each such ground insufficient, as though the Appellees before that court were the appealing parties. For example, in discussing the challenge to the indictment because counts under the Racketeer Influenced and Corrupt Organizations Act were included, the Fifth Circuit declared:

> In order to dismiss an indictment for failure to state an offense *we must find* that the indictment 'contains the elements of the offense intended to be charged.'

Uni Oil at 953 (emphasis added). The cases cited for that proposition, however, were cases in which the defendants were the appellants, complaining of the sufficiency of the indictments, just the opposite of the present case. The Fifth Circuit Court in this case was reviewing the dismissal of an indictment, not a refusal to dismiss, and it manifestly was not required to find that the indictment "does not contain the elements of the offense to be charged." That approach prejudicially shifted the burden to show error onto the Defendants-Appellees before that court and constituted reversible error.

By way of further example, in the succeeding section of its opinion, the Fifth Circuit addressed the complaint that the indictment is defective for failing to delineate the various elements of commercial bribery, one supposed example of "racketeering activities." The Circuit Court conceded that the indictment fails to "allege each element of commercial bribery separately" and that this constitutes a "deficiency." (*Uni Oil* at 954). Nonetheless, the Court noted the usual test of sufficiency articulated in *Russell v. United States,* 369 U.S. 749, 82 S.CT. 1038 (1962) and, while observing that it did "not condone the Government's sloppiness," *Uni Oil* at 954, decided that the indictment passes the *Russell* test. That, however, was decidedly not the question before the Court. This is not a circumstance in which the indictment tracks exactly the statute being charged, with the burden thus falling upon the defendant to point out what additional allegations are necessary to fulfill the statutory purpose. Rather, the Fifth Circuit's role was to decide only whether the Trial Court, in determining that the indictment was deficient, was guilty of an outright abuse of discretion in so ruling and dismissing the faulty indictment.

B. The Test on Review in the Circuit Court was Abuse of Discretion.

Nowhere in its opinion does the Circuit Court acknowledge or apply the abuse of discretion test, which is the appropriate test when reviewing a Trial Court's dismissal of an indictment. *See. e.g., United States v. Poore,* 594 F.2d 39 (4th Cir. 1979); *United States v. Schwartz,* 464 F.2d 449, 511 (2nd Cir. 1972); *United States v. Lee,* 413 F.2d 910 (7th Cir. 1969) cert. den. 396 U.S. 1022, 90 S. Ct. 595; *Truchinski v. United States,* 393

F.2d 627 (8th Cir. 1968) cert. den. 393 U.S. 831, 89 S. Ct. 104; *United States v. Tane,* 329 F.2d 848 (2nd Cir. 1964); *Carrado v. United States,* 210 F.2d 712, 717 (D.C. Cir. 1953). The Fifth Circuit was not called upon to agree with Judge Sterling or to say that it, in the same position, would have ruled as he did. The Circuit Court was not to reverse unless the Government proved an actual abuse of discretion in the Judge's ruling, and this the Government failed to do. Indeed, there was never even any attempt to demonstrate abuse of discretion.

C. If the Basis of the Trial Court's Order of Dismissal was Unclear, The Fifth Circuit Should Have Requested Further Clarification.

The Trial Court was not required to state grounds for its ruling, *e.g.* FED. R. CIV. P. 12, although the Government could have easily requested reasons if it had cared to. No complaint of this character was raised in the Government's briefs before the Fifth Circuit in the course of carrying its burden to demonstrate error. However, if there was doubt in the minds of the Fifth Circuit as to the Trial Court's grounds for dismissal, proper procedure would have been for the Circuit Court to retain jurisdiction of the appeal and to request a clarification from the Trial Court as to the reasons for its decision. *See e.g., United States v. Theriault,* 526 F.2d 698, 699 (5th Cir 1976); *In re Pope,* 580 F.2d 620, 623 (D.C. Cir. 1978); *Kreda v. Rush,* 550 F.2d 888, 890 (3rd Cir. 1977). This device would have allowed for the considerable discretion accorded the District Court in assessing the sufficiency of indictments, as well as for the opportunity simply to reindict properly, and the heavy burden upon the Government, as appellant in the

court below, to show that the District Court was guilty of abuse of discretion. Instead, the Fifth Circuit simply burdened the Defendants, who were Appellees before that Court, with the onus of justifying the Trial Court's ruling, at the peril of reversal if the Circuit Court did not exactly agree with the ruling made by the Trial Court. The prejudice to Defendant Fisher and others in his position is apparent; saddled with the improper burden of demonstrating defects in the indictment de novo they now find themselves Petitioners before this Court.

II.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THE INDICTMENT IS AN INAPPROPRIATE USAGE OF THE RICO STATUTE.

A. The Undisputed Purpose of the RICO statute is the Control of Organized Crime.

The Racketeer Influenced and Corrupt Organizations Act, now codified at 18 U.S.C. § 1961 *et. seq.* (Supp. 1981), was originally enacted as Title IX of the Organized Crime Control Act of 1970. *See* Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970). The Statement of Findings and Purposes of that Act makes it abundantly clear that the Act was enacted for the purpose of providing new remedies to the Government for combating the pervasive problem of organized crime. In cases such as *United States v. Boylan,* 620 F.2d 359 (2nd Cir. 1980) and *United States v. Brown,* 555 F.2d 407 (5th Cir. 1977), the Courts have quoted directly from this Findings and Purposes section of the Act to demonstrate

how clear-cut the legislative intent was. Even the opinion rendered by the Fifth Circuit in the case at bar concedes that "the legislative history of RICO vividly demonstrates that is was primarily enacted to combat organized crime." *United States v. Uni Oil,* 646 F.2d 946 (5th Cir. 1981). Thus, the title of the Act that produced this statute, the legislative history of the statute, and the cases litigated under the statute, all plainly indicate that the RICO statute was primarily intended to combat organized crime.

B. Defendant Fisher Had no Connection with Organized Crime.

Nowhere in the indictment is there any allegation that Defendant Fisher was in any way connected with organized crime personalities. Rather, the indictment makes it abundantly clear that Fisher was a legitimate businessman engaging in complex transactions involving the buying and selling of crude oil. The indictment almost suggests by omission that Defendant Fisher was not involved in organized crime or dealing with members of organized crime. While such involvement or association is not absolutely essential for prosecution under the racketeering statute, it is a factor that should weigh heavily in considering the over-zealous extension of this statute to areas far beyond the original congressional intent.

Appellate opinions in other RICO prosecutions have pointed out, however, that the RICO statute is not directed toward the "status" of organized crime, but the "activities" of organized crime. The Fifth Circuit opinion in the case at bar points out that "membership in organized crime is not a necessary element of a RICO conviction." *Uni Oil* at 953. It is necessary, however, to demonstrate that the Defendant was engaged in "racke-

teering activities." The list of racketeering activities provided by the statute includes such traditional organized crime activities as gambling, prostitution, and extortion. The only traditional organized crime activity of which Defendant Fisher is even accused is bribery, and that accusation warrants close scrutiny.

The RICO statute authorizes prosecution for business activities in connection with state bribery statutes. 18 U.S.C.A. 1961(1) (Supp. 1981). The Texas bribery statute follows the common law rule, and the standard adhered to in most states, and defines bribery as the conferring of a benefit on a *public official* for certain acts in the exercise of his *official powers.* Tex. Pen. Code Ann. § 36.02 (Vernon 1974). Moreover, the case of *United States v. Forsyth,* 560 F.2d 1127 (3rd Cir. 1977), points out that when the RICO statute refers to acts prohibited by state bribery statutes it is referring to a generic description of bribery. The opinion in that case then provides a generic description of bribery as "conduct which is intended, at least by the alleged briber, as an assault on the integrity of a public office or an official action." *Forsyth* at 1137. There is no allegation in the indictment that Fisher or the other Defendants ever made any payments to public officials or in any way attempted to exert any influence on official actions. Under the common law definition of bribery, the standard provided in the Texas Penal Code, and the generic description of bribery that the RICO statute was meant to encompass, there was no bribery in this case.

With the allegation of bribery eliminated as a consideration, the only remaining activities of which Defendant Fisher is accused, and upon which the RICO indictment is grounded, are federal mail fraud and wire fraud. These

allegations are based upon the fact that the Defendants violated EPAA oil pricing guidelines, and some of the transactions constituting these violations were conducted through the mails and over the wires. The real evil that the Government is concerned about here is the violation of federal energy regulations. Yet, since such violations are not "racketeering activities," they alone will not suffice to invoke the RICO statute. Accordingly, the Government has strained to pull the regulation violations through the mail and wire fraud statutes in order indirectly to step under the RICO umbrella with its stricter penalties and forfeiture provisions. This approach could lead to a very dangerous form of bootstrapping. If this practice is sanctioned, *anyone* who violates *any* federal regulation, and at some point in the transaction happens to use the mails or the telephone—which is almost always the case—would be subject to prosecution under the RICO statute. Surely Congress did not intend for the RICO statute to be applied so broadly as to suddenly classify virtually all violators of federal regulations as "racketeers."

This fear was expressed by a Federal Court in the remarkably similar case of *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (1975). That case involved a private civil action under the RICO statute, rather than a criminal prosecution, but all of the other facts were very close to the instant case. The Defendants allegedly violated federal regulations involving wage and price controls in the early 1970's. Since the Defendants transacted business through the mails, Plaintiff sought to bootstrap his attack from regulation violations to mail fraud to RICO —just as the Government has done in the case at bar. The Court firmly rejected this misuse of the RICO statute. It conceded that mail fraud technically comes within the

statutory definition of "racketeering activities," but pointed to the clear legislative history of RICO and refused to extend that statute to this kind of case. The Court observed that:

> It is clear that it was aimed not at legitimate business organizations but at combatting 'a society of criminals who seek to operate outside of the control of the American people and their Governments.' There is no question that Defendant cannot be so characterized.
>
> Assuming that Plaintiffs' allegations have merit, the most that can be said is that Defendants' transactions, on this occasion, have been illegal. Defendant is not a member of a society of criminals operating outside of the law.

Barr at 113. The instant case is almost identical to *Barr* and the same analysis is persuasive here. Defendant Fisher was not involved in any real organized crime activities.

C. The Prosecution of Defendant Fisher Under RICO Carries the Statute Beyond Its Intended Bounds.

The RICO statute was drafted very broadly out of necessity. While the statute was directed at members of organized crime, it would be impractical and unconstitutional to criminalize and punish a class of people because of their status. Thus, rather than identifying a class of persons as criminals, the act focuses on a class of activities, most of which have been traditionally associated with organized crime. In compiling this list of activities, however, the drafters of the RICO statute cut a very broad swath because of the difficulties of dealing with organized crime. Because organized crime is so "highly sophisticated, diversified and widespread," Racketeer In-

fluenced and Corrupt Organizations Act, *supra* at § 1, it is often impossible to discover and prosecute the illicit activities that organized crime thrives upon. The RICO statute, then, includes offenses such as wire fraud and mail fraud to enlarge the net which Federal Prosecutors might cast over organized crime. These activities were included as additional tools for the Government to use in getting to the "racketeers" that the statute was meant to control—they were *not* intended to be a means whereby persons wholly outside of organized crime might be subjected to the penalties of the RICO statute. To allow the statute to be used against persons like Defendant Fisher, who are clearly not racketeers, is to ignore the very clear legislative intent of the act.

Admittedly, the line between what is and is not an activity of organized crime is sometimes a fine one. The enforcement of the act could not be limited to card-carrying members of the so-called Mafia, and there may be many close cases that hover on the border of that sphere. In such cases good faith prosecution should be allowed. But there also comes a point at which over-zealous prosecution steps way beyond that line, where the use of the RICO statute cannot even arguably be said to relate to controlling organized crime, and where the broad terms of the statute, which were intended to aid in the attack on organized crime, are twisted and manipulated to be used for wholly different purposes. Surely the prosecution of Defendant Fisher under the racketeering statute is such a case.

The cases that have been litigated under the RICO statute provide some guidance in this task of line-drawing. The cases cited by the Government in previous briefing on this case all involve some activity that has tradition-

ally been associated with organized crime or racketeering. For example, *United States v. Brown,* 555 F.2d 407 (5th Cir. 1977), involved the bribery of a police department over a 20 year period to protect gambling, lottery, and prostitution rackets; *United States v. Hawes,* 529 F.2d 472 (5th Cir. 1976), was a gambling prosecution; *United States v. McLaurin,* 557 F.2d 1064 (5th Cir. 1977) concerned an extensive prostitution ring; *United States v. Campanale,* 518 F.2d 352 (9th Cir. 1975), involved an extortion scheme; and *United States v. Mandel,* 415 F.Supp. 997 (D. Md. 1976), was a prosecution for bribery of a public official, the Governor of the State of Maryland. In the instant case there was no bribery of a public official, no extortion, no prostitution, no gambling, no numbers games. There was merely a businessman buying and selling crude oil, sometimes through the mail and the wires, in a manner which allegedly violated Federal Energy Regulations.

In contrast to the cases previously cited by the Government, all of which are distinguishable for their heavy flavor of organized crime, there is one RICO case which is remarkably similar to the present litigation. The previously cited case of *Barr v. WUI/TAS, Inc.* also involved the violation of federal regulations in an attempt to bootstrap these violations to the level of mail fraud, and through that to a RICO violation. In that case the Court wisely recognized that RICO had been extended far beyond its original purpose and rejected the attempted application of RICO.

Thus, the case law reflects the approach which Defendant Fisher is urging. In cases that are arguably related to organized crime and traditional organized crime acitvities, RICO can and should be applied. The purpose

of the statute should be kept in mind, however, and when prosecutions under RICO are not even conceivably related to organized crime, a line should be drawn, the Court should recognize the prosecution as an overbroad application of the racketeering statute, and the indictment should be dismissed.

III.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THE INDICTMENT DOES NOT CONTAIN FACTS SUFFICIENT TO CONSTITUTE COMMERCIAL BRIBERY.

One of the allegations of "racketeering activities" used by the Government to invoke the RICO statute is a charge of commercial bribery under § 32.43 of the Texas Penal Code. As previously argued under Point of Error II, the listing of "business activities in connection with state bribery statutes" as a racketeering activity proscribed by the RICO statute was intended to refer to the generic description of bribery, which pertains to attempts to influence public officials in their official acts. The "commercial bribery" prohibited by the Texas statute is quite different from the generic description of bribery that was intended to be encompassed by the RICO statute. A RICO indictment based on commercial bribery, then, goes beyond the intended purposes of the statute, and should be dismssied.

Even if the Texas commercial bribery statute is an appropriate foundation for a RICO indictment, however, the facts alleged in this indictment cannot possibly be construed as constituting a violation of the commercial bribery statute. The statute defines commercial bribery as follows:

> (b) A person who is a fiduciary commits an offense if he intentionally solicits, accepts, or agrees to accept any benefit as consideration for:
>
> (1) violating a duty to a beneficiary; or
>
> (2) otherwise causing harm to a beneficiary by an act or omission.
>
> (c) A person commits an offense if he offers, confers, or agrees to confer any benefit the acceptance of which is an offense under subsection (b) of this section.

Tex. Penal Code Ann. § 32.43 (Vernon 1974). This statutory definition utterly fails to encompass the present situation for three reasons. First, the only recognizable beneficiaries in these transactions were the Defendants themselves. Each of the companies involved was principally owned by one or more of the Defendants, they were the only beneficiaries and it was impossible for them to have violated a duty to themselves. Second, the commentary to the commercial bribery statute points out that, "this section is aimed principally at kickbacks. If the beneficiary expressly or impliedly consents to the kickback—as is customary in some trades—there is no violation of duty and hence no violation. . . ." Tex. Penal Code Ann. § 32.43, Practice Commentary (Vernon 1974). The oil industry is exactly the type of trade where kickbacks and similar payments are common and expressly or impliedly consented to. The payments alleged in the instant case, however, were not even kickbacks, but simply broker's fees in accordance with common industry practices. They were certainly not intended, nor did they function, as bribes. Finally, even if there were other beneficiaries, there is no indication that they were harmed by the transactions. In fact, the indictment alleges that the companies involved profited greatly from the

transactions, which renders impossible a violation of duty or harmful effect on beneficiaries. The indictment fails to allege any facts which would constitute commercial bribery. If anything, it alleges facts which would render commercial bribery impossible.

In the opinion of the Fifth Circuit in the case at bar, the Court summarily dismissed this argument by characterizing it as an attack on the indictment for failing to delineate the elements of commercial bribery. The point urged by Defendant Fisher, however, is not so much that the federal indictment failed to allege each and every element of the state statute, but that the facts alleged and the scenario described in the federal indictment render a violation of the state statute impossible. Since the indictment under the RICO statute is partially based on a violation of the state statute regarding commercial bribery, the failure of the indictment to allege facts sufficient to constitute a violation of that state statute renders the indictment defective.

IV.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THE EMERGENCY PETROLEUM ALLOCATION ACT CERTIFICATION REGULATIONS UPON WHICH APPELLANT'S PROSECUTION IS GROUNDED ARE UNCONSTITUTIONALLY VAGUE.

A. Constitutionality of the Energy Regulations is Essential to the Prosecutorial Scheme.

In his motion to dismiss the indictment and accompanying memorandum of authorities presented to the Trial Court, Defendant James E. Fisher argued that the lengthy indictment was based upon alleged violation of the

Emergency Petroleum Allocation Act certification regulations and that those regulations, because of vagueness, failed to provide fair warning of the obligations and responsibilities they imposed. Both in its written response to Appellant Fisher's Motion to Dismiss and in its brief before the Fifth Circuit, the Government's reply was simply that the regulations were irrelevant to this case inasmuch as the various Defendants were charged with Title 18 offenses, and not direct violations of the energy regulations. The Government never contended in the Trial Court or before the Fifth Circuit, however, that Appellant Fisher was not attacking the constitutionality per se. Indeed, in its brief to the Fifth Circuit, the Government acknowledged that "Appellees argued in the District Court that the underlying certification requirements were unconstitutionally vague and that no guidance was offered as to the treatments of inventories of crude oil." Brief for Appellant at 13-14. (*See also* the Reply Brief for Appellant in which it is noted that 'in their Motion to Dismiss filed in the District Court, Appellees argued that the EPAA certification regulations were unconstitutional." Reply brief for Appellant at 2-3.) The Government is surely correct in this representation. In his brief before the Fifth Circuit Appellant Fisher contended that 'if his supposed violation of DOE certification regulations issued pursuant to the EPAA is to form the basis of violations of other substantive criminal statutes, then two things are sure: (1) Those regulations must be constitutionally adequate for their violation to serve as a predicate for violation of other criminal statutes. . . ." Brief for Appellee James E. Fisher at 9.

The Fifth Circuit, however, discussed the constitutionality issue only in the context of deciding whether an

EPAA issue was adjudicated by the District Court. The Circuit Court ignored the motions and briefs of the Appellees (Petitioners here) and interpreted the constitutional argument raised as "not an attack on constitutionality of the regulations per se but on the constitutionality of prosecuting a person for conduct that was made criminal without fair notice." *Uni Oil* at 950. With all due respect to the lower court, this is simply wrong. The direct question of constitutionality of the certification regulations was raised; the Government's response was simply that the regulations were irrelevant inasmuch as the offenses charged were Title 18 offenses, and not direct violation of the energy statute. The Fifth Circuit also falls into this same trap by noting that "there is no charge of a violation of EPAA regulations." *Uni Oil* at 949. The Fifth Circuit continues its erroneous approach by concluding that:

> In the absence of the existence of the EPA or of any EPAA regulations it would presumably be a criminal act to use the mails as part of a scheme to defraud by falsely certifying facts relating to the provenance of oil knowingly and with intent to defraud. What makes the act criminal is not the regulation, but the use of the mails to carry an untrue document fabricated with fraudulent purpose. *Uni Oil* at 949.

The Circuit Court cites exactly no authorities for this assertion that, absent the EPA or EPAA regulations, use of the mails as part of a scheme to defraud by falsely certifying facts relating to the source of oil would still be criminal. The lower court only "presumes this"; that is not the law. The criminal element, says the Circuit Court, comes from the use of the mails to carry untrue documents fraudulently produced. However, the very (and only) thing which makes any documents in this

case "untrue" is violation of the underlying regulations. It is conceptually impossible to separate the Title 18 charges from the predicate regulations; it is alleged non-compliance with those regulations which constitutes the violation of the substantive felony statutes. If, as here, the offenses in question consist of a statute superimposed upon a regulation, then the constitutional scrutiny must penetrate the first layer and recognize that the violation of the statute depends upon non-compliance with the underlying, predicate regulation.

Although the Government has been vigorously attempting to argue that this case has little to do with the EPAA regulations, the Grand Jury which returned the indictment in question inextricably bound every count of the indictment to an alleged violation of the certification regulations. For example, in the very first count the indictment sets forth the EPAA certification regulations in great detail:

COUNT ONE

1. At all times material to this Indictment and specially from, on or about August 1, 1975, continuing to on or about December 31, 1977:

a. There was in existence the Emergency Petroleum Allocation Act (EPAA) of 1973, Title 15, United States Code, Section 751, *et seq.*, which *provided* for mandatory allocation of all crude petroleum produced in or imported into the United States.

g. There were also in existence a certification program with regard to the purchase and sale of domestic crude petroleum, pursuant to the Emergency Petroleum Allocation Act of 1973, Title 15, United States Code, Section 751, *et seq.*, and regu-

lations set forth by the Federal Energy Administration, now known as the United States Department of Energy. Those regulations provided in pertinent part:

> Each seller of domestic crude petroleum, . . . shall, with respect to each sale of domestic crude petroleum . . . certify in writing to the purchaser the amount of old crude petroleum included in the volume of domestic crude petroleum so sold. The certification shall also contain a statement that the price charged for the domestic crude petroleum is no greater than the maximum price permitted pursuant to this part. Title 10, Code of Federal Regulations, Section 212.131(a)(2).

[3]

This section was amended, effective September 1, 1976, as follows:

> Each seller of domestic crude oil, . . . shall, with respect to each sale of domestic crude oil . . . certify in writing to the purchaser the respective volumes of and respective per barrel prices for the old crude oil, new crude oil so sold. The certification shall also contain a statement that the price charged for the domestic crude oil is no greater than the maximum price permitted pursuant to this part. Title 10, Code of Federal Regulations, Section 212.131(b)(1).

Indictment, Count One. These regulations were incorporated by reference into each of the many following counts.

The balance of Count One of the Indictment proceeds to describe a supposed conspiracy, the object of which was to certify "old" oil as "new" oil, those terms being the offspring of the EPAA regulations. Thereafter, Count

Two of the Indictment purports to charge violations of the Racketeer Influenced and Corrupt Organizations Act in the form of a "scheme and artifice to defraud" and prevent the Federal Energy Administration of its right to have its regulations providing for the certification of domestic petroleum sales conducted properly and free of corruption. That scheme is further described as one to pass off "old" domestic crude oil according to the regulations, as "new" domestic crude oil and to use the United States Postal Service in the process of disseminating fraudulent certifications. This and the remaining mail fraud counts also charge the Defendants with defrauding purchasers "who relied under the Federal Energy Regulations on certifications made by Defendants, as to whether the volume of domestic crude petroleum purchased were . . . 'old' crude petroleum." Indictment, Counts 3-34. The Defendants were further accused of carrying out this alleged fraud by vending oil that was "falsely certified." *Id.*

In short, all of the mail fraud counts were grounded completely in the existence of EPAA certification regulations and upon the intentional violation of the obligations imposed by those regulations. Had the various Defendants complied with the regulations, no conviction on any of these counts would be possible. The RICO counts likewise are simply based upon the alleged scheme of mail fraud found in Counts 3-34. The wire fraud counts, Counts 35-59, mirror the mail fraud counts.

Further still, each of the counts charging false statements was also based upon a supposed violation of the certification regulations. In each of these counts the statement alleged was said to be a "false writing" which was "caused to be prepared and submitted, pursuant to afore-

said act and regulations" certifying that the sale of certain crude oil was 100% upper tier crude oil. In each instance, it is alleged, "the certification" was false. Indictment, Counts 60-84.

As this discussion reveals, the entire indictment is based upon alleged violations of the certification regulations promulgated pursuant to the EPAA. The indictment is unmistakably constructed throughout so as to ground the main offenses charged in noncompliance with the certification requirements. None of the conduct which supposedly constitutes a felony is illicit absent a showing of noncompliance with the underlying energy certification regulations. The Government, in its brief before the Fifth Circuit, acknowledges as much when it concedes that "appellees are charged with schemes to miscertify and mislabel crude oil. . . ." Brief For Appellant at 14.

Focusing upon the constitutionality of regulations, violation of which gives rise to a supposed Title 18 offense, is not a novel idea. The significance of the constitutionality of the underlying regulations is exemplified by the case of *United States v. Blumberg*, 258 F.Supp. 885 (D. Del. 1966). Defendant in that case was convicted under 18 U.S.C. § 1001, one of the statutes allegedly violated in the present case. The Defendant there was convicted because he did not disclose the winner of the "twin double" at a racetrack, in violation of Internal Revenue Service Regulations. The conviction was overturned and the Defendant was ultimately acquitted, however, because the IRS regulations were found to be unconstitutionally vague. Here, as in the *Blumberg* case, the indictment was brought under certain sections of Title 18, including section 1001, but the illicit nature of the conduct which constitutes the felony offense is created by regulation

requirements. Where the underlying legal responsibility is imposed by regulation, then the vagueness of that regulation becomes of paramount importance.

B. The EPAA Certification Regulations do not Provide Constitutionally Fair Notice.

The Due Process Clause of the Fifth Amendment requires that statutory language be precise enough to provide notice of prohibited conduct. A statute written in "terms so vague that men of ordinary intelligence must necessarily guess at its meaning violates the first essential of Due Process." *Connally v. General Construction Company*, 269 U.S. 385 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). As observed by this Court,

> The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harris, 347 U.S. 612 (1954).

This Court has more recently declared that:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 106, 107 (1972).

Regulations too are subject to these exacting principles. Fundamental fairness requires that regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application. *Boyce Motor Lines v. United States,* 342 U.S. 337 (1952); *Brennan v. Occupational Safety and Health Review Commission,* 505 F.2d 869 (10th Cir. 1974). One can have knowledge of a purported legal duty imposed by regulations only if there is adequate notice. If criminal sanctions are imposed, courts will not tolerate lack of specificity. E.g. *United States v. Morrison,* 536 F.2d 286 (9th Cir. 1976). As this court observed in *Kraus and Bros. v. United States,* 327 U.S. 614 at 621-2 (1946), to regulations

> [M]ust be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive . . . the dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

As noted by certain Co-Appellants before the Fifth Circuit, the vagueness of a particular regulation must be assessed in the light of the environment in which they were meant to apply. See e.g. *Diebold, Inc. v. Marshall,* 585 F.2d 1327 (6th Cir. 1978); *United States v. Insco,* 496 F.2d 204 (5th Cir. 1974); *Power Plant Div. v. Occupational Safety and Health Review Commission,* 590 F.2d 1363 (5th Cir. 1979). In the last case cited, a civil penalty provided by statute had been imposed upon the company for noncompliance with a regulation. The

Fifth Circuit, however, reversed that action because it was not demonstrated that the industry appreciated what it was the regulation required of it. The Court expressly observed that:

> [T]he employer can properly be deemed to have notice of his duties under [29 C.F.R.] section 1926.28(a) only when it is demonstrated that a reasonable employer in his industry would have recognized the same [duties] *Id.* at 1365.

The federal energy regulations cited by the Government in the indictment are 10 Code of Federal Regulations § 212.131(a)(2), § 212.131(b)(1) and § 210.912 (a)(b). The simple citation of sections obscures the fact that of these, § 212.131(b)(1), the portion regarding certification by "sellers" of crude oil, was altered four times during the time period affected by this indictment: (1) January, 1974; (2) August, 1976; (3) September, 1976; and (4) August, 1977. The only regulation date noted in the indictment precedes an edited rendition of § 212.131(b)(1) on page 3, declaring that the quoted section was effective September 1, 1976. The date September 1, 1976 occurred well *after* the date of any alleged wrongful act of Defendant Fisher set out in the indictment and prosecution based upon this version of § 212.-131(b)(1) would represent an ex post facto prosecution.

The 1973 oil embargo spawned a system in which supplier-purchaser relationships were essentially frozen. The Federal Energy Administration created arbitrary categories of crude oil produced and sold domestically, classifying crude from property producing in 1972 as "old" to the extent that a like quantity of crude was thereafter produced. Crude originating from previously non-productive property or in excess of the level of production of prop-

erties in 1972 was termed "new" or "upper tier" oil. Resellers have since purchased and conveyed oil from varied sources which bore those classifications. In so doing they have faced a maze of unclear, confusing and constantly changing regulations issued by the FEA. This state of confusion is aptly evidenced by the indictment in that the Government has cited but a fragment of the repeatedly changed regulations which it contends were not satisfied.

A telling example of the confusion and Catch-22 inequity facing resellers in the industry, particularly relative newcomers, because of the jungle of changing and arbitrary FEA regulations in *Basin, Inc. v. Federal Energy Administration,* 534 F.2d 324 (Em. App. 1975) (re-implementation of lapsed FEA regulations tending to reduce competition to the disadvantage of new marketers of crude oil and abrogating existing contracts). Even the original Emergency Petroleum Allocation Act (15 U.S.C. § 751 et seq.) has been judicially described as "inartfully drawn." *Mobil Oil Corporation v. Federal Energy Administration,* 435 F.Supp. 983, 986 (N.D. Tex 1977).

The DOE itself has acknowledged the uncertainty inherent in the regulations, for violation of which the Government now seeks to prosecute this Defendant. In 42 F. Reg. 250 (Dec. 29, 1977), the DOE conceded that:

> The DOE is aware that, even with the adoption of these rules for application after January 1, 1978, considerable confusion continues to exist as to the appropriate application of the rules of subpart F to sales by crude oil resellers prior January 1, 1978. In order to provide appropriate guidance DOE will soon issue a further notice on this issue.

Subsection L was a provision designed to afford direction to resellers regarding certification and pricing. The December 29, 1977 remarks of the DOE were in conjunction with issuance of a new subsection L. Direction to resellers to aid in complying with the old subsection L, however, was something without which resellers were left to struggle.

The certification regulations require that a crude oil reseller "certify in writing to the purchaser the respective volumes of . . . old crude, and new crude oil. . . ." 10 C.F.R. § 212.131(b)(1). This requirement is sensible only upon the assumption that the reseller in question does not employ an inventory for purposes of bookkeeping. No better explanation of this complication can be given than that which was presented in the brief of Appellees The Crude Company and John Allen Masek to the Fifth Circuit of Appeals and thus it is adopted:

> With a "no inventory" assumption, the regulations inform a reseller what certifications must be made. Under this assumption, when a reseller buys one barrel of oil from producer A, and immediately thereafter sells one barrel of oil to refiner B, it is for bookkeeping purposes the same barrel of oil—and would need to have the same certification. Given this "no inventory" premise, the regulation simply requires that a reseller sell each barrel of oil with the same certification it had at the time of purchase.
>
> But in the commercial context where the regulation is meant to be applied, this "no inventory" assumption is unrealistic. Crude oil resellers, like most businessmen, would be expected to keep inventories for bookkeeping purposes. In fact, during the period covered by the Indictment, EPAA price regulations required that they do so. For example, under 10 C.F.R. § 212.93, the lawful price a reseller was

allowed to charge for crude oil depended upon the "cost of the product in inventory."

The problem is that, when applied to a reseller who keeps inventory for bookkeeping purposes, the regulation does not indicate what certifications are required. When a barrel of oil is bought from producer A, it goes into inventory, when a barrel of oil is sold to refiner B, it comes from inventory. For bookkeeping purposes it need not, and usually will not, be the same barrel of oil. But the EPAA certification regulations do not inform a reseller what certification is appropriate for a barrel of oil coming from inventory. The President of the Petroleum Resellers Association recently testified at an Energy Department hearing about this continuing problem.

> For example, if I had 100,000 barrels of old oil in inventory and in the meantime bought another 100,000 barrels of [new], and in a subsequent month sold 100,000 barrels from inventory, which barrels did I sell?
>
> That is one of the problems, again, that we have in the current reseller regulations. It is not clear. . . .

The cause of this problem is that, there are no physical differences between old oil and new oil. It is a regulatory distinction that has meaning only on a bookkeeper's ledger. The certification attached to a barrel of oil depends upon bookkeeping entries —not upon which physical barrel of oil is actually transferred. This is if a "Last In, First Out" accounting system is used; certifications will be entirely different than if a "First In, First Out" system is used. And if another system is used, an entirely different set of certifications will result. With inventory bookkeeping, a regulation cannot prescribe the required certification unless it specifies a particular accounting system or establishes different rules for each of several designated accounting systems. Unfortunately, the EPAA certifications regulations did

neither. Thus they require accurate certifications without giving resellers any idea whatsoever about what certifications would be considered accurate.

These regulations fail to give resellers any guidance regarding what constitutes accurate certification. The indictment simply assumes that certifications in connection with the purchase of old oil from one company, while at the same time selling the same amount of new oil to another company, constitutes willful miscertification. Because the price regulations required resellers to maintain an inventory for purposes of bookkeeping, yet the certification regulations fail to make allowance for such an inventory, the regulations did not give fair warning that certifications under these conditions would be improper. Because of the lack of fair warning, the Due Process Clause prohibits criminal prosecution based upon alleged violation of the responsibilities imposed by the certification regulations. Accordingly, dismissal of the indictment which depended upon alleged violation of those regulations was entirely proper.

V.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THAT COURT HAD NO JURISDICTION TO REVIEW ADJUDICATION BY THE TRIAL COURT OF EMERGENCY PETROLEUM ALLOCATION ACT ISSUES.

In view of the strict page limitations imposed upon applications for writ of certiorari and the fact that Co-Petitioner's The Crude Company and John Allen Masek will argue this issue in their application for writ, Petitioner Fisher will simply adopt the argument of his Co-Petitioners on this point, without further discussion.

VI.

THE FIFTH CIRCUIT ERRED IN REVERSING THE TRIAL COURT'S DISMISSAL OF THE INDICTMENT BECAUSE THE EMERGENCY PETROLEUM ACT PREEMPTED THE RELEVANT PROVISIONS OF TITLE EIGHTEEN TO THE EXTENT THEY MIGHT HAVE PERTAINED TO ALLEGATIONS IN THIS INDICTMENT.

In view of the strict page limitations imposed upon applications for writ of certiorari and the fact that Co-Petitioners The Crude Company and John Allen Masek will argue in their application for writ, Petitioner Fisher will simply adopt the argument of his Co-Petitioners on this point, without further discussion.

CONCLUSION

The Petition for Writ of Certiorari should be granted, the action of the Fifth Circuit Court of Appeals should be reversed, and the dismissal of the indictment by the District Court should be reinstated.

Respectfully submitted,

RYAN & MARSHALL

By: _____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of Petitioner James E. Fisher was forwarded this the 30th day of October, 1981 by U.S. Mail to Mr. Wade Hampton McCree, Jr., Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530, Daniel Hedges, United States Attorney, P. O. Box 61129, Houston, Texas 77208, counsel for Respondent; and Mr. Vincent J. Fuller counsel, for Petitioners The Crude Company and John Allen Masek, Williams & Connally, Hill Building, Washington, D.C. 20006.

DAN RYAN

APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

UNI OIL, INC., Thomas M. "Mick" Hajecate, Thomas H. "Tom" Hajecate, James E. Fisher, Charles R. Akin, Charles Goss and Ball Marketing Enterprises,
Defendants-Appellees.

UNITED STATES of America,
Plaintiff-Appellant,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., et al.,
Defendants-Appellees.

Nos. 79-2488, 79-3082

UNITED STATES COURT OF APPEALS
Fifth Circuit

May 19, 1981.

As Modified on Denial of Rehearings and Rehearings En Banc

Sept. 4, 1981.

The United States District Court for the Southern District of Texas, Ross N. Sterling, J., entered judgments dismissing indictments, and appeals were taken. Following consolidation, the Court of Appeals, James C. Hill,

Circuit Judge, held that: (1) claims that prosecutions for RICO violations, for alleged mail fraud, for commercial bribery, and for other criminal violations were unconstitutional because of absence of fair notice, through regulations issued pursuant to Emergency Petroleum Allocation Act, of conduct that was criminal did not raise issue such as vested exclusive jurisdiction over appeal from dismissal of complaints in Temporary Emergency Court of Appeals; (2) the Emergency Petroleum Allocation Act did not "preempt" application of general criminal statutes to conduct regulated by the Act so as to require appeal from dismissal of indictment to be within exclusive jurisdiction of Temporary Emergency Court of Appeals; (3) membership in organized crime was not necessary element to establish conviction for violation of racketeer influenced and corrupt organizations statute; (4) count of indictment charging commercial bribery was not materially defective, even though it failed to allege separately each element of commercial bribery; (5) indictment was not duplicitous; and (6) jurisdictional requisite for charging violation of statute proscribing making of false statement in "matter within the jurisdiction of any department or agency of the United States" was satisfied.

Reversed and remanded .

* * *

J. A. Tony Canales, U. S. Atty., James R. Gough, Asst. U. S. Atty., Houston, Tex., Richard A. Sauber, Sp. Atty., Washington, D. C., for the U. S.

Charles N. Wooten, Sr., Charles Brandt, Lafayette, La., Thano Dameris, Houston, Tex., for Uni Oil, Hajecate, Hajecate, Akin, Goss and Ball Marketing.

Dan Ryan, Houston, Tex., for Fisher.

Vincent J. Fuller, Judith A. Miller, Scott Blake Harris, Washington, D. C., Edward B. McDonough, Jr., Houston, Tex., Robert L. Weinberg, Washington, D. C., for Crude Co. and Masek.

Appeals from the United States District Court for the Southern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

Under regulations adopted by the Department of Energy, *see* 10 C.F.R. §§ 212.1-212.188 (1980),[1] vendors of domestic crude oil operate subject to various price controls. This appeal is a consolidation of two cases in which appellee oil dealers were indicted for various fraudulent schemes and practices which allegedly enabled them to sell domestic crude oil for prices in excess of legal maxima.[2] *See* 10 C.F.R. § 212.131 (1980).

Although the indictments exclusively charge Title 18 offenses, both the indictments and the defenses thereto make use of the Emergency Petroleum Allocation Act (EPAA) 15 U.S.C. § 751 *et seq.* and its regulations. The tension between Title 18 and the EPAA poses diffi-

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1. For convenience, we cite the applicable regulations that were in effect until January 28, 1981. *See* 46 Fed. Reg. 9909 (1981). The instant case actually involves ancestor provisions, since amended.

2. The price at which domestic crude oil may lawfully be sold depends *inter alia* on its origin. As resellers, appellees were obliged to "certify" that the oil they traded came from "old" or "new" wells since different ceiling prices applied to each. The gravamen of the Government's charge is that appellees purchased "old" oil and resold it as "new," willfully using fraudulent means to miscertify it in the process.

cult questions regarding our jurisdiction and the sufficiency of the indictments. The district court dismissed both indictments. For the reasons set out below, we conclude that we have jurisdiction to consider this appeal and that both indictments are sufficient. Therefore, we reverse and remand to the district court.

I. *The Indictments*

On March 7, 1979 a grand jury in Houston, Texas returned an eighty-four count indictment against Uni Oil, Ball Marketing Enterprise and five named individual defendants, Thomas "Mick" Hajecate, Thomas "Tom" Hajecate, James Fisher, Charles Akin, and Charlie Goss. *United States v. Uni Oil, Inc.*, No. 79-2488 (hereinafter *Uni Oil*). The indictment charged that the defendants conspired to violate the Racketeer Influenced and Corrupt Organizations (RICO) statute in order to miscertify and sell oil that was properly considered "old" oil as "new" oil, 18 U.S.C. § 1962(d) [Count 1], conducted the affairs of an enterprise, Uni Oil, through a pattern of racketeering activity which included mail fraud and commercial bribery, 18 U.S.C. § 1962(c) [Count 2], furthered a scheme and artifice to defraud the United States and its agencies through mailings which fraudulently certified "old" oil as "new" oil, 18 U.S.C. § 1341 [Counts 3-34], engaged in wire fraud to further the same scheme and artifice, 18 U.S.C. § 1343 [Counts 35-59], and made false and fraudulent representations regarding the origin of oil in records caused to be prepared and submitted pursuant to government regulation. 18 U.S.C. § 1001 [Counts 60-84].

The appellees challenged the indictment on numerous grounds. After extensive briefing, a hearing was held

before the Honorable Ross N. Sterling of the United States District Court for the Southern District of Texas on May 29, 1979. At the close of argument, Judge Sterling announced that the appellees' motions to dismiss were granted. One week later the judge issued a one sentence order dismissing the indictment. Despite the complexity of the issues, the order was not accompanied by a memorandum or by any other analysis by the district judge.

On April 30, 1979 a grand jury in Houston, Texas returned a twenty-nine count indictment against the Mid-Atlantic Petroleum Company, Ltd., The Crude Company, Uni Oil, Inc., H.C. Iran, Ltd. and five named individuals, John Allen Masek, Thomas "Tom" Hajecate, Thomas "Mick" Hajecate, Charles R. Akin, and R. Stanley Corbitt. *United States v. Mid-Atlantic Petroleum Co., Ltd.*, No. 79-3082 (hereinafter *Mapco*). The indictment charged that the defendants conspired to conduct the affairs of an enterprise, Uni Oil, through a pattern of racketeering activity in order to disguise oil that was properly to be considered "old" oil as "new" oil, 18 U.S.C. § 1962(d) [Count 1], conducted the affairs of Uni Oil through a pattern of racketeering activity, 18 U.S.C. § 1962(c) [Count 2], caused false and fraudulent invoices and certificates to be placed in the mail 18 U.S.C. § 1341 [Counts 3-23], and knowingly made false and fraudulent representations in a matter within the jurisdiction of the Federal Energy Administraton, *i. e.*, falsely certifying domestic crude oil, 18 U.S.C. § 1001 [Counts 24-29].

As in *Uni Oil*, the appellees challenged the indictment on numerous grounds. After extensive briefing, oral argument was held before the Honorable Ross N. Sterling of

the United States District Court for the Southern District of Texas. From the bench, Judge Sterling ordered dismissal of the indictment for "the reasons stated in the Defendants' briefs." On July 25, 1979, Judge Sterling issued a written order granting the motions to dismiss "for the reasons set out in the Defendants' briefs."

II. *Discussion*

A. *Jurisdiction*

The threshold question is whether we have jurisdiction to consider this appeal. Section 211(b)(2) of the Economic Stabilization Act of 1970 provides that the Temporary Emergency Court of Appeals shall have "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." 12 U.S.C. § 1904 note (West Supp. 1977). Section 5(a)(1) of the Emergency Petroleum Allocation Act, as amended, 15 U.S.C. § 754, incorporates and carries forward this grant of special jurisdiction. Accordingly, if the district court adjudicated an EPAA issue we lack jurisdiction. *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 187 (2d Cir. 1979).

[1] We begin by noting that an EPAA issue is not raised simply because the indictments "included an explanation of the EPAA regulations proscribing miscertification and that such regulations provided a convenient format for defendants' [alleged] scheme of fraud and criminal enterprise," *United States v. Zang*, 645 F.2d 999 at 1003 (Em. App. 1981). However, the thrust of appellees' argument is not that the indictment arose under the EPAA. Rather, they contend that two EPAA issues were raised in defense to the indictment. *See Coastal*

States Marketing, Inc. v. New England Petroleum Corp., 604 F.2d 179 (2d Cir. 1979). First, they argue that the EPAA regulations "upon which the charges were predicated" are unconstitutionally vague. Second, they argue that the EPAA preempted certain Title 18 provisions as they might have otherwise applied to the allegations in the indictment. *See* Post Argument Brief of Appellees The Crude Company and Masek at 2. Appellees urge that the above issues require a constitutional construction of the EPAA; hence, both the letter and spirit of § 211(b)(2) are served by transferring this case to TECA. *See United States v. Wickland*, 619 F.2d 75 (Em. App. 1980). Appellees' excellent briefs present a forceful argument. Nonetheless, a close examination of the character of the issues presented reveals that none of them arise under the EPAA.

B. *Jurisdiction and Vagueness*

[2] An analysis of the appellees' defenses cannot be conducted without reference to the indictments. Considering the indictments themselves, not the ones the defendants seek for us to imagine in their stead, there is no charge of a violation of EPAA regulations. The crimes charged vary with each count, but Count 3 of No. 79-2488 will serve as an example. The issue under Count 3 is whether Invoice #147, mailed to Mid-Atlantic Petroleum Company from one of the co-defendants, Uni Oil, on July 22, 1976, contained untrue representations, made knowingly and with intent to defraud, as part of the scheme alleged in the indictment. In the absence of the existence of the EPA or of any EPAA regulations, it would presumably be a criminal act to use the mails as part of a scheme to defraud by falsely certifying facts relating to the provenance of oil knowingly and with

intent to defraud. What makes the act criminal is not the regulation, but the use of the mails to carry an untrue document fabricated with fraudulent purpose.

If the description of "old" and "new" oil, wherever set forth, whether in regulations or technical literature, is so vague that no one can tell one from the other (or if, as put by the defendants, they do not provide "fair notice" of that difference between "old" and "new" oil), evidence to that effect and the arguments of counsel might persuade a jury that the defendants did not knowingly make a false statement or lacked intent to defraud or otherwise did not violate the statute upon which the indictment is based. On Appeal, the defendants phrase this issue as "whether the regulations are unconstitutionally vague." Thus, they assert, the constitutionality of the regulations is at issue and only TECA has jurisdiction.

This contention is subtly different from their contention in the district court. Below they contended that "FEA's Crude Oil Certification Regulations Cannot be the Basis for Criminal Prosecution Unless they Provided 'Fair Notice' of What Conduct was Required." "Because of this lack of fair notice, the Due Process Clause prohibits criminal prosecution of the defendants for violating the certification regulations." This was not an attack on constitutionality of the regulations *per se* but on the constitutionality of prosecuting a person for conduct that was made criminal without fair notice. That issue does not require resolution of the constitutionality or even the interpretation of the regulations; only whether the criminal statutes clearly prescribed the conduct charged.

In *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978), the defendant was convicted under the RICO,

mail fraud, and false statements statutes (the same statutes involved here). She claimed that the certifications she was alleged to have falsely made were too ambiguous to support a false statements prosecution because they did not adequately set out what information she was required to supply. The Seventh Circuit rejected that conclusion, but rested in part on a construction of the certification requirement. "Moreover, even if we agreed with *Weatherspoon* that the language is not a model of clarity, we note that the 'vagueness' argument was open to *Weatherspoon* at trial, for the Government was required under 18 U.S.C. § 1001 to establish not only that the certification was false, but also that *Weatherspoon* had made the certification *knowing* it to be false." 581 F.2d at 601 (emphasis in original).

Although the TECA has defined its "arising under" jurisdiction broadly, to include all EPAA issues, it has drawn a distinction between an issue "arising under" the EPAA and one that only peripherally involves a regulation.

In *United States v. Cooper,* 482 F.2d 1393 (Em. App. 1973), the defendant was charged with violations of rent control regulations and with violations of the false statement statute, 18 U.S.C. § 1001 (one of the statutes invoked against the present defendants). He appealed to the Ninth Circuit and that court transferred the case to TECA. TECA took jurisdiction over the charges of violation of regulations, but treated the transfer as an untimely notice of appeal and dismissed the appeal. It concluded, however, that the false statement charge did not arise under the statute and was not within the appellate jurisdiction of TECA, even though it involved false statements on forms required by ESA regulations.

"We start with the premise that a conviction under 18 U.S.C. § 1001 would be appealable only to a court of appeals, under 28 U.S.C. § 1291, unless the Stabilization Act provides otherwise. . . . We do not think that Count 1 being based on 18 U.S.C. § 1001, was a controversy "arising under" any title of the Stabilization Act or under regulations or orders issued thereunder." *Id.* at 1397.

Thus, the mere fact that a criminal conviction may rest on a false statement made while engaging in a business regulated by EPAA or ESA, does not of itself place the action within TECA's jurisdiction. The case or controversy itself must arise under the statute or regulations; the resolution of the issue must turn on proper interpretation of EPAA or ESA. Moreover, some initial determination of the scope of the EPAA or ESA regulations is necessary to determine who has jurisdiction. In *Cooper,* TECA had to determine that 18 U.S.C. § 1001 stated an offense separate and exclusive of ESA issues before it could determine that it lacked jurisdiction.

The ruling in *Bray v. United States,* 423 U.S. 73, 96 S.Ct. 307, 46 L.Ed.2d 215 (1975) was based on similar logic. In *Bray* the defendant was convicted of criminal contempt for failure to comply with a district court order to respond to an IRS subpoena issued pursuant to ESA. He appealed to the circuit court and it dismissed, holding that the appeal should be to TECA. The Supreme Court reversed:

> The Act does not contain any provision prohibiting the violation of a district court's enforcement order or establishing penalties for such a violation. . . . Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform

> interpretation of the substantive provisions of the stabilization scheme.

423 U.S. at 75, 96 S.Ct. at 309.

Bray cited and expanded upon the holding in *Cooper*. The mere fact that a prosecution involves duties created by the ESA or EPAA is not decisive concerning who has jurisdiction. The crucial question is whether the case involves issues that must be decided by TECA in order that "uniform interpretation of the substantive provisions of the" statute may be achieved. *Bray* involved no such issues because the validity of the contempt charge "was not dependent on the existence of [ESA] violations or even the continuation of the [ESA] investigation." *Id.* *See also United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976).

This line of reasoning was further strengthened by the TECA's recent decision in *United States v. Zang*, 645 F.2d 999 (Em. App. 1981). The indictment in *Zang* was substantially similar to the one here. The defendants were charged under certain general criminal statutes for allegedly devising a fraudulent scheme through the use of their companies and the mail and wire communications, whereby they could resell "old" crude oil at "new" or "exempt" oil prices.

The defendants' motions to dismiss contended, *inter alia*, that 15 U.S.C. § 754 preempted the general criminal statutes of Title 18 and that the government was engaging in selective prosecution. The district court denied the defendants' motions. Defendants then sought a writ of mandamus from TECA ordering the trial court to sustain their motions to dismiss the indictment.

Relying extensively on *Cooper* and *Bray*, TECA concluded that the EPAA, as amended, does not "provide for or mention any of these grave (Title 18) felony offenses, and this Court has no jurisdiction of this appeal." At 1003. TECA's conclusion, quoted from *Bray*, has equal force here:

> This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and 'to funnel in to one court all the appeals arising out of the District Courts and thus gain in consistency of decision.' S. Rep. No. 92-507, p. 10 (1971), U.S. Code Cong. & Admin. News 1971, pp. 2283, 2292.
>
> Nothing in the Act or in its legislative history indicates that Congress intended 'to include existing offenses, already covered under Title 18, under the umbrella of the Stabilization Act.' *United States v. Cooper*, 482 F.2d 1393, 1398 (TECA 1973). Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.

423 U.S. at 74-75, 96 S.Ct. at 308-309.

Appellees correctly point out that *Zang* did not decide the identical issues presented by this case. The focus in *Zang* was on "the felony offenses charged in the indictment," at 1003, rather than the defenses raised by the defendant. But this difference is irrelevant here. The appellees' defenses, like the charges in *Cooper*, *Bray*, and *Zang*, simply do not require interpretation of the substantive provisions of the EPAA.

We do not take a constricted view of TECA jurisdiction. TECA is vested with jurisdiction over any EPAA issue adjudicated by a district court whether or not the action can be said to arise under EPAA in the constitutional sense. However, not every case that in some manner involves the EPAA necessarily raises EPAA issues.[3]

In sum the defenses raised by the appellees do not involve "interpretation of the substantive provisions" of the EPAA. They involve interpretation of the proper scope of the criminal code statutes under which the defendants were charged.[4]

C. *Jurisdiction and "Preemption"*

[3] The defendants contend also that the EPAA preempts application of the general criminal statutes to con-

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3. Relying heavily on *United States v. Wickland*, 619 F.2d 75 (Em. App. 1980), appellees urge us to characterize any issue "interwoven with" an analysis of the EPAA as an EPAA issue. Close examination shows, however, that *Wickland* supports a more stringent standard in order to find an EPAA issue. In *Wickland* the government sought to enforce a subpoena issued pursuant to the EPAA. The defendant urged that the government should be equitably estopped from enforcing the subpoena. The court characterized the issue as "a federal agency's attempt to fulfill its duty under statutes and regulations over which this court (TECA) has exclusive jurisdiction." *Id.* at 78. It found that "[a]ny 'general questions of administrative law' are clearly interwoven with provisions of the ESA and EPAA *and involve policy questions directly affecting the EPAA and its enforcement.*" *Id.* at 79 (emphasis added). *Wickland* stands in sharp contrast to this case. Here, there are no "policy questions directly affecting the EPAA." Nor is a federal agency acting pursuant to statute and regulations over which TECA has exclusive jurisdiction. Rather, the United States Attorney has indicted the defendant for criminal offenses under Title 18.

4. Appellees' argument that an individual director, officer, or agent cannot be imprisoned for more than a year "unless he also has knowledge or reasonably should have known of notice of noncompliance received by the corporation from the President" 15 U.S.C. § 754 is inapplicable since defendants are charged with Title 18 offenses, not violations of the EPAA.

duct regulated by EPAA. This claim is also within our jurisdiction.

In *United States v. Vixie*, 532 F.2d 1277 (9th Cir. 1976), the defendant contended that his false statement conviction was invalid because he should have been charged under the provisions of ESA dealing with compelling compliance with subpoenas. The circuit court, rather than submitting that question of preemption to TECA, concluded that nothing in ESA suggested that its compliance provisions were the exclusive remedy for failure to comply and that the defendant did not simply fail to comply, she falsely complied; the court therefore concluded that there were no preemption.

In *United States v. Gilliland*, 312 U.S. 86, 61 S.Ct. 518, 85 L.Ed. 598 (1941), the Supreme Court considered whether provisions of the Hot Oil Act, 15 U.S.C. §§ 715-715(d), (requiring affidavits concerning the amount of oil shipped from wells) preempted prosecutions under the predecessor of 18 U.S.C. § 1001 for false statements on affidavits even though the regulations may have been violated as well. The question was not phrased as an issue involving the interpretation of the regulations, but as an issue involving the interpretation of the scope of the criminal statute. The court held that the provisions of the general false statements statute were not limited to the enforcement of the "hot oil" regulations and that the later "hot oil" act did not repeal the earlier general statute so far as the latter applied to "hot oil" documents. The statutes were complimentary, not exclusive. *See also United States v. Carter*, 526 F.2d 1276 (5th Cir. 1976) (determining that the false statement provisions of 15 U.S.C. § 645(a) do not preempt 18 U.S.C. § 1001, even though they may both reach false statements on SBA

forms. 18 U.S.C. § 1001 requires proof of elements not required by the other statute).

Because the preemption issue concerns only the EPAA's effect on an unrelated criminal statute, "[r]eview in the TECA . . . is not necessary to assure uniform interpretation of the *substantive* provisions of the stabilization scheme." *Bray v. United States,* 423 U.S. at 75, 96 S.Ct. at 309 (emphasis added). *Bray* also cautions us to avoid burdening the TECA with additional appeals, so that the TECA will not be prevented from promptly deciding appeals involving substantive provisions of the regulatory schemes. *Id.* Accordingly, we should not construe a peripheral issue as "arising under" the EPAA.[5]

D. *Further Challenges to the Indictments*

Appellees' remaining points, which should have been disposed of by the district court, require little discussion.

Appellees challenge the government's use of the Racketeer Influenced and Corrupt Organizations statute, 18 U.S.C. § 1961 *et seq.* on essentially two grounds. First, they contend that RICO's language is unconstitutionally vague. *See Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Second, they argue that the indictments fail to state an offense because they, the defendants, are not members of organized crime, the explicit target of RICO.

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5. Although we have found that the question presented here is not properly cast as one of preemption, we note that TECA has held that the Title 18 offenses in the instant indictments are not preempted by 15 U.S.C. § 754. *United States v. Zang,* 645 F.2d 999 (Em. App. 1981). *See Mobile Oil Corp. v. Tully,* 639 F.2d 912 (2d Cir. 1981) (resolution of whether New York state tax on gross receipts of oil companies doing business in New York was preempted by EPAA transferred to TECA because a thorough and careful examination of the EPAA was required).

[4] Appellees vagueness argument focuses on the definition of "racketeering activity." 18 U.S.C. § 1961. We must cut short appellees' proposed tour of the RICO statute because they lack standing to undertake it. *See Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 152-153, 90 S.Ct. 827, 829-830, 25 L.Ed.2d 184 (1970). The "racketeering activity" for which the *Unj Oil* defendants were indicted consisted of conspiracy and substantive "violations of the Mail Fraud Statute as charged in Counts Three through Thirty-four . . . and violation of the State of Texas Commercial Bribery Statute." Contrary to appellees professed bafflement, both the language of the indictment charging racketeering and the sections of the statute from which it is drawn are composed of easily understood terms. The language is more than sufficient "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989 (1954).

[5, 6] In order to dismiss an indictment for failure to state an offense we must find that the indictment does not "contain[ ] the elements of the offense intended to be charged." *Russell v. United States,* 369 U.S. 749, 763, 82 S.Ct. 1038, 1046, 8 L.Ed.2d 240 (1962), *United States v. Meacham,* 626 F.2d 503, 507 (5th Cir. 1980). Although the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO's use to members of organized crime. Stated differently, membership in organized crime is not a necessary element of a RICO conviction. Accordingly, appellees' argument on this point fails.

[7] Appellees also allege that the government has engaged in selective prosecution.

> To support a defense of selective or disc[r]iminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie,* (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'

United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978). In a sentence, this "heavy burden" has not been carried by the defendants. Of course, our conclusion does not prohibit them from further developing the record to support their contentions.

[8, 9] The *Uni Oil* appellees also contend that count 1 is defective for failing to delineate the elements of commercial bribery. An indictment is sufficient if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense and if it states facts adequate to permit the defendant to plead former jeopardy in a subsequent prosecution. *Russell v. United States,* 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-47, 8 L.Ed.2d 240 (1962). Furthermore, as the Supreme Court has explained, the sufficiency of an indictment "is not a question of whether it *could* have been more definite and certain." *United States v. Debrow,* 346 U.S. 374, 378, 74 S.Ct. 113, 115, 98 L.Ed. 92 (1953)

(emphasis added). Although we do not condone the government's sloppiness, we find the indictment passes the test outlined above. Despite the government's failure to allege each element of commercial bribery separately, the indictment contains copious facts which adequately apprise the defendants of the nature of the charge against them. Therefore, the indictment's deficiency is not material. *See United States v. Ylda*, 643 F.2d 348 at 352 (5th Cir. 1981).

[10] The *Mapco* appellees also urge that counts 1 through 23 are duplicitous because in addition to charging RICO and mail fraud violations, each counts also charges the additional offense of conspiracy to defraud the United States, 18 U.S.C. § 371. A duplicitous indictment charges two or more distinct offenses in a single count. *Bins v. United States*, 331 F.2d 390 (5th Cir.), *cert. denied*, 397 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964), Fed. R. Crim. P. 8(a).

A straightforward reading of the indictment rebuts appellees' effort to interject § 371 conspiracies into counts 1-23 through a hypertechnical reading of selected parts of the various counts. Counts must be read as a whole to determine their meaning. *See United States v. Markham*, 537 F.2d 187, 192 (5th Cir. 1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977). The dangers of duplicity, that it will be impossible to determine what the jury has found and that the defendants may be subject to double jeopardy in the event of a subsequent prosecution, are not present in this case. *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 397 U.S. 880, 85 S.Ct. 149, 13 L.Ed.2d 87 (1964). Unlike *Bins* in which the defendant was charged with two separate acts of false uttering in the same count, only one

violation is charged in each count here. Count 1 charges a RICO conspiracy, count 2 a substantive RICO violation, and counts 3-24 each rely on a separate mailing in charging mail fraud.

[11] Next, *Mapco* appellees contend that the mailings in counts 3-18 were simply routine, regularly employed mailings and hence cannot form the basis for mail fraud charges. *See United States v. Tarnopol,* 561 F.2d 466, 472 (3d Cir. 1977). The record, as developed to date, does not support this view of the mailings. Rather, the indictment clearly charges that the mailings were used "for the purpose of executing" a scheme or artifice to defraud. *See Parr v. United States,* 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). If the appellees develop this argument at trial they may have valid grounds for a motion for judgment of acquittal.

[12] Finally, *Mapco* appellees contend that counts 24-29 fail to state an offense under 18 U.S.C. § 1001 because they refer only to statements made to a private purchaser. Section 1001 requires that the false statement be made in a "matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001 (West 1976). This jurisdictional requisite has been satisfied.

The indictment sufficiently charges that the allegedly false certificates of defendants were relied on by refiners who prepared records which ultimately influenced FEA calculations. 18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference. In order to achieve this objective, it is well settled that a false statement need not be made directly to a federal agency in order to sustain a § 1001 conviction. *United States v. Baker,* 626 F.2d 512, 514 (5th Cir. 1980);

United States v. Hooper, 596 F.2d 219 (7th Cir. 1979). If, however, subsequently developed evidence shows that the certification in question did not influence FEA calculations, either directly or indirectly, the Appellees may have valid grounds for a motion for judgment of acquittal on these grounds.

We find no merit in appellees' remaining arguments. Accordingly, the judgment of the district court is reversed and remanded for proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES of America,
Plaintiff-Appellant,

v.

UNI OIL, INC., Thomas M. "Mick" Hajecate, Thomas H. "Tom" Hajecate, James E. Fisher, Charles R. Akin, Charles Goss and Ball Marketing Enterprise,
Defendants-Appellees.

UNITED STATES of America,
Plaintiff-Appellant,

v.

MID-ATLANTIC PETROLEUM COMPANY, LTD., et al.,
Defendants-Appellees.

Nos. 79-2488, 79-3082

UNITED STATES COURT OF APPEALS
Fifth Circuit

Sept. 4, 1981.

Defendants were convicted in the United States District Court for the Southern District of Texas, Ross N. Sterling, J., of making false statements and they appealed. The Court of Appeals, 646 F.2d 946, affirmed. On petition for rehearing, the Court of Appeals held that indictment which charged that allegedly false certificates of defendants were relied upon by refiners who prepared records which ultimately influenced Federal Energy Agency calculations charged the offense of making false statements.

Petition denied.

* * *

James Gough, Asst. U. S. Atty., Houston, Tex., Richard Sauber, Sp. Atty., Washington, D. C., for plaintiff-appellant.

Charles Wooten, Charles Brandt, Lafayette, La., Thano Dameris, Houston, Tex., for Uni Oil, Hajecate, Hajecate, Akin, Goss & Ball Marketing.

Dan Ryan, Houston, Tex., for Fisher.

Maurice Bresenhan, Jr., Houston, Tex., for R. Stanley Corbitt.

Michael E. Tigar, Washington, D. C., for Hajecate, Hajecate & Akin.

Vincent J. Fuller, Judith A. Miller, Scott Blake Harris, Washington, D. C., for Crude Co. & Masek.

Edward B. McDonough, Jr., Houston, Tex., Robert L. Weinberg, Washington, D. C., for defendants-appellees.

Appeals from the United States District Court for the Southern District of Texas.

ON PETITIONS FOR REHEARING AND PETITIONS FOR REHEARING EN BANC

(5th Cir. 1981, 646 F.2d 946)

Before HILL, RUBIN and ANDERSON, Circuit Judges.

PER CURIAM.

Pursuant to a review of the Appellee's briefs we strike the penultimate paragraph and replace it with the following.

[1, 2] The indictment sufficiently charges that the allegedly false certificates of defendants were relied on by

refiners who prepared records which ultimately influenced FEA calculations. 18 U.S.C. § 1001 is designed to protect federal funds and functions from fraudulent interference. In order to achieve this objective, it is well settled that a false statement need not be made directly to a federal agency in order to sustain a § 1001 conviction. *United States v. Baker,* 626 F.2d 512, 514 (5th Cir. 1980); *United States v. Hooper,* 596 F.2d 219 (7th Cir. 1979). If, however, subsequently developed evidence shows that the certification in question did not influence FEA calculations, either directly or indirectly, the Appellees may have valid grounds for a motion for judgment of acquittal on these grounds.

With the above observations, the Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petitions for Rehearing En Banc are DENIED.